TOPICAL INDEX

Page

Petition for Certiorari:

Jurisdictional Statement 4
Questions Presented 4

Brief in Support:

Statement of the Case 9
The Trustees' Plan 11
Appellants' Contention 11
Specification of Error 12
Summary of Argument 12

INDEX OF AUTHORITIES

Central Tr. Co. v. Chi. Auditorium Assn., 240 U.S. 581, 36 S. Ct. 412 23

Dayton v. Stanard, 241 U.S. 588, 590; 36 Sup. Ct. 695, 60 L. Ed. 1190 (1916) 18

F. D. I. C. v. Department of Financial Institutions,

Garrett v. Edge Moor Iron Co., Del. Ch. 142, 194 At. 15 affirmed sub. nom. Pennsylvania Company v. Cox, 23 Dela. Ch. 193, 199 At. 671 ..... 6, 15

Glenn Liquidation, (1935) Sec. 510 ..... 3, 22

Greva v. Rainey, 2 Cal. (2d) 338, 41 Pac. (2d) 328 ..... 6, 17, 20, 21

Group of Institutional Investors v. C. M. ST. P. & P. R. Co., 318 U.S. 523, 573, 87 Law Ed. 959, 1011 ..... 3, 5, 8, 21, 22

Hammer v. Tuffy, 145 Fed. (2d) 447, 449 (C. C. A.) 2d (1944) 17, 19

Hanson, Effect of Insolvency Proceedings on Creditors' Right to Interest, 32 Mich. Law Review 1069 at 1071, 1072 ..... 3, 6, 19, 22

Harkin v. Brundage, 276 U.S. 36, 42-3, 45, 48 S. Ct. 268 21

Hazel Atlas Glass Co. v. Van Dyk & Reeves, 8 Fed. (2d) 716 23

Home L. Ins. Co. v. Wosson, 187 Ark. 769, 62 S.W. (2d) 27 (1933) 20

In re Assoc. Gas & Elec. Co., 149 F. (2d) at 1006 21

In re Barclay Park Hotel Corporation, 90 Fed. (2d) 595 6

In re Donahoe's, 19 Fed. Supp. 441 6

In re Farmers Bank of Lone Rock, 248 Wis. 269, 21 N.W. (2d) 410 ..... 6, 20

INDEX OF AUTHORITIES (Cont.)

Page

In re Fechheimer-Fishel Co., 212 Fed. 357 23

In re Pacific Coast Building Loan Association, (1940) 15 Cal. (2d) 134, 99 P. (2d) 251 ..... 20, 21

In re Prudential Tr. Co., 244 Mass. 64, 138 N.E. 702 (1923) 20

In re Realty Associates Sec. Corp., 66 Fed. Supp. 416 23

Kuehner v. Irv. Tr. Co., 299 U.S. 445, 451; 57 Sup. Ct. 298, 81 L. Ed. 340 (1937) 18

Ledford v. Skinner, 156 Or. 651, 69 P. (2d) 519 (1937) 17

Moore v. Bay, 45 F. (2d) 449 21

Otis Co. v. S. E. C., 323 U.S. 624; 65 S. Ct. 483; 89 L. Ed. 511 ..... 5, 8, 18

Penington v. Commonwealth Hotel Construction Co., 17 Del. Ch. 394, 155 Ot. 514, 75 A.L.R. 1136 ..... 5, 14

People v. American Loan and Trust Company, 172 N.Y. 371, 65 N.E. 200 ..... 6, 16, 19

People v. Merchants T. Co., 187 N.Y. 293, 79 N.E. 100 (1907) 20

Price v. Spokane Silver & Leading Co., 97 Fed. (2d) 237, 245 21

Reichert v. Metropolitan Trust Co., (1940) 293 Mich. 76, 291 N.W. 228 20

Sexton v. Dreyfus, 219 U.S. 339, 31 S. Ct. 256 ..... 3, 22

Squire v. Am. Exp. Co., 131 Ohio St. 239, 2 N.E. (2d) 766 (1936) 20

Stein v. Delano, 121 Fed. (2d) 975 (CCA 3, 1941) 20

Taylor v. Corning Bk. & T. Co., 185 Ark. 691, 48 S.W. (2d) 1102 (1932) 20

INDEX OF AUTHORITIES (Cont.)

Page

Thomas v. Western Car. Co., 149 U.S. 95, 116; 13 S. Ct. 824, 37 L. Ed. 663 20

Ticonic Natl. Bank v. Sprague, 303 U.S. 406, 82 L. Ed. 926 ..... 3, 22

U. S. v. General Motors, 323 U.S. 373, 65 S. Ct. 357 6

Vanston Bond Holders Protective Committee v. Green, 327 U.S. 774, 90 Law Ed. 1003, 66 S. Ct. 822 ..... 5, 8, 13

Williams v. Renshaw, 220 N.Y. Sup. 532 18
113 Ind. Ap. 14, 44 N.E. (2d) 992 (1942) 19

50 Am. Jur. 261, Statutes, Sec. 274 16

Bankruptcy Act, (11 U.S.C.A. Ch. 10) 2, 4, 5

Public Utility Holding Company Act of 1935 (15 U.S.C.A. (c) II (C) 2, 9

Title 28, Sec. 347 U.S.C.A. (Sec. 240 of the Judicial Code) 8

In the Supreme Court

of the United States

OCTOBER TERM, 1947

In the Matter of the Petition of PORTLAND ELCTRIC POWER COMPANY, a corporation, debtor,

JAMES WATSON, et al., designated herein as First Preferred Stockholders,

Appellants,

vs.

PORTLAND ELECTRIC POWER COMPANY, a corporation, debtor, THOMAS W. DELZELL and R. L. CLARK, independent trustees, PRIOR PREFERENCE STOCKHOLDERS COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK and SECURITIES AND EXCHANGE COMMISSION,

Appellees.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

To the United States Circuit Court of Appeals for the Ninth Circuit.

Petitioners are First Preferred stockholders of the Debtor which is in reorganization under Chapter X of

the Bankruptcy Act (11 U.S.C.A. Ch. 10) pursuant to its voluntary petition filed and approved April 3, 1939.

The debtor is an Oregon corporation and a public utility holding company within the terms of the Public Utility Holding Company Act of 1935 (15 U.S.C.A. (c) II (C)). It had issued outstanding as of October 31, 1945, the following classes of securities:

Income Bonds		
Principal	$16,157,600	
Accrued interest	11,235,525	$27,393,125
7% Prior Preference Stock		
Par value	$ 5,682,400	
Accrued dividend arrearages	5,104,689	$10,787,089
Cumulative total		$38,180,214
First Preferred Stock		
Par or liquidating value	$12,483,320	
Accrued dividend arrearages	10,210,581	$22,693,901
Cumulative total		$60,874,115

Petitioners contend that the plan of reorganization of the debtor approved by the order of the District Court of the United States and the District Court of Oregon, dated June 29, 1946, as amended by an order of the same court dated February 6, 1947, is unfair to the Debtor's First Preferred stockholders in this: It allows holders of Prior Preference stock to participate in the assets of the estate on the basis of a claim which includes dividends unpaid from January 1, 1933 to October 31, 1945, when in fact the only dividends which can be properly included in the allowable claim

of the Prior Preference stockholders are those which accrued up to April 3, 1939, the date when this proceeding for reorganization was instituted. Under the plan, $2,718,291 face amount of new securities are allocated to the Prior Preference stockholders as compensation for dividends unpaid subsequent to the filing of the petition. The First Preferred stockholders contend that these securities should properly be allocated to them and not to the Prior Preference stockholders. The relevant portions of debtor's charter are quoted in the Argument.

There is no question that the Prior Preference stock is senior to the First Preferred stock. The question presented herein is the extent of the Prior Preference stockholders' seniority. There is no controlling precedent. The issue must be resolved by choice between two competing principles developed in analogous situations, to-wit:

1. As between unsecured creditors of different classes, none is entitled to interest out of general assets, regardless of their relative priorities until all have received principal. *Sexton v. Dreyfus,* 219 U.S. 339, 31 S. Ct. 256; *Ticonic Natl. Bank v. Sprague,* 303 U.S. 406, 82 L. Ed. 926; *Group of Institutional Investors v. C. M. ST. P. & P. R. Co.,* 318 U.S. 523, 573, 87 Law Ed. 959, 1011; *Glenn Liquidation,* (1935) Sec. 510; *Hanson, Effect of Insolvency Proceedings on Creditors' Right to Interest,* 32 Mich. Law Review 1069 at 1071, 1072. Appellants contend (~~p. 16-19~~) that this is the controlling analogy,

and that as between *stockholders* of different classes, just as between creditors of different classes, none is entitled to dividends pending reorganization, regardless of their relative priorities, until all have received par.

2. As between creditors and stockholders, the former are entitled to payment in full with interest to the date of payment before the latter participate at all. Respondents present this analogy, contending that:

> "By virtue of their charter preferences, the prior preference stockholders in the instant case, are in the same position with respect to the First Preferred stockholders as are creditors with respect to stockhloders generally."

The antithesis of these two propositions is the crux of the issue.

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court has jurisdiction to review the order herein questioned because it involves the interpretation of a Federal statute, to-wit, Chapter X of the Bankruptcy Act (11 U.S.C.A., Chapter 10) and especially the fairness of the plan of reorganization of the debtor approved under Sections 169 and 174 of the Act (11 U.S.C.A. 569, 574).

QUESTION PRESENTED

The question herein presented is whether in the light

of the charter provision defining their rights, the standard of fairness established for reorganization plans under the Federal Bankruptcy Act, Section 174, 221 (11 U.S.C.A. 574, 621) allows the Prior Preference stockholders compensation for dividends unpaid on their stock for the period subsequent to the institution of the reorganization proceeding when the allowance of such compensation to them will result in denying to all other stockholders compensation for their claim based upon the par amount of their stock.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals has decided a Federal question in a manner probably in conflict with the applicable decisions of this court. *Vanston Bond Holders Protective Committee v. Green*, 327 U.S. 774, 90 Law Ed. 1003, 66 S. Ct. 822; *Group of Institutional Investors v. C. M. St. P. & P. R. Co.*, 318 U.S. 523 at p. 573, 87 Law Ed. 958, at p. 1011.

2. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this court. *cf. Otis Co. v. S. E. C.*, 323 U.S. 624; 65 S. Ct. 483; 89 L. Ed. 511.

3. The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. *Penington v. Commonwealth Hotel Construction Co.*, 17 Del. Ch. 394, 155

Ot. 514, 75 A.L.R. 1136; *Garrett v. Edge Moor Iron Co.*, Del. Ch. 142, 194 At. 15 affirmed sub. nom. *Pennsylvania Company v. Cox*, 23 Dela. Ch. 193, 199 At. 671; *People v. American Loan and Trust Company*, 172 N.Y. 371, 65 N.E. 200; *Greva v. Rainey*, 2 Cal. (2d) 338, 41 Pac. (2d) 328; *In re Farmers Bank of Lone Rock*, 248 Wis. 269, 21 N.W. (2d) 410; *Hanson, Effect of Insolvency Proceedings on Creditors' Right to Interest*, 32 Mich. Law Rev. 1069, 1071-1072.

4. The decision of the Circuit Court of Appeals is in conflict with decisions of the Circuit Courts of Appeals for other circuits. *In re Barclay Park Hotel Corporation*, 90 Fed. (2d) 595; *In re Donahoe's*, 19 Fed. Supp. 441.

5. The question presented herein is fundamental to the further conduct of the reorganization proceeding. *U. S. v. General Motors*, 323 U.S. 373, 65 S. Ct. 357.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this court directed to the U. S. Circuit Court of Appeals for the Ninth Circuit comanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the cases numbered on its Dockets No. 11441 and No. 11573, entitled: In the Matter of the Petition of Portland Electric Power Company, a corporation, Debtor, L. C. White, Helen M. White, et al., designated herein as First Preferred Stockholders, Appellants, vs. Portland Electric Power Company, a corporation, debtor, Thomas

W. Delzell and R. L. Clark, independent trustees, Prior Preference Stockholders Committee, Guaranty Trust Company of New York and Securities and Exchange Commission, Appellees, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the U. S. and that the judgment herein of said Circuit Court be reversed by this court; and for such other and further relief as to this court may seem proper.

Dated October 3, 1947.

JAMES WATSON,
of Appellants.
~~MORRIS L. FORER,~~
Packard Bldg.,
Philadelphia, Pa.,
Attorney for Appellants.

BRIEF IN SUPPORT OF PETITION

1. Opinions of Courts Below.

The opinion in the Circuit Court is reported in the Advance Sheets of U. S. Circuit Court of Appeals for the Ninth Circuit for June 17, 1947, commencing on Page 1 and is found in the record herein at Page 291. The report of the special master is found in the printed record herein at pages 66 and 123. The opinion of the Securities and Exchange Commission is found in the record at page 217.

2. Jurisdiction.

(a) The date of the order to be reviewed is June 29, 1946 (R. 142) as modified by an order dated February 6, 1947. The statutory provision which is believed to sustain the jurisdiction of this court is Title 28, Section 347 U.S.C.A. (Section 240 of the Judicial Code).

(b) Since the question which arises herein is fundamental in the operation and administration of Federal Bankruptcy Act and perhaps of other Federal statutes covering the reorganization of corporations, the jurisdiction of this court is beyond question.

(c) This court has issued writs of certiorari repeatedly in such cases. *Group of Institutional Investors v. C. M. St. Paul & P. R. Co.*, 318 U.S. 523, 573, 87 Law Ed. 959, 1011; *Vanston Bondholders Protective Committee v. Green*, 327 U.S. 774, 66 S. Ct. 822, 90 Law Ed. 1003; *Otis & Co. v. S. E. C.*, 323 U.S. 624; 65 S. Ct. 483; 89 L. Ed. 511.

STATEMENT OF THE CASE

The debtor is an Oregon corporation (R. 2) and is a holding corporation (R. 3) under the terms of the Public Utility Holding Company Act of 1935 (15 U.S.C.A. Ch. 2C). On April 3, 1939, it filed a petition (R. 2) for reorganization under Chapter X of the Bankruptcy Act, which was approved on the same day (R. 43).

On August 3, 1945, the trustees of the debtor filed three alternative proposed plans of reorganization. Pursuant to the order of the court (R. 51) said plans were submitted to the Securities and Exchange Commission which, on January 14, 1946, issued its order (R. 53) pursuant to Section 172 of the Bankruptcy Act (11 U.S. C.A. 572), approving the trustees' proposed second alternative amended plan of reorganization (R. 193) subject to certain conditions. On January 21, 1946, the debtor's trustees filed a revised version of their second alternative amended plan (R. 259) amended further to comply with the conditions set forth in the order of the Securities & Exchange Commission (R. 53).

Honorable Estes Snedecor was appointed Special Master (R. 56) to conduct a hearing on said plan, receive evidence with respect thereto, making findings of fact and conclusions of law as to all legal issues arising with respect thereto and also findings and recommendations as to the valuation of the debtor and report his findings of fact and conclusions to the District Court (R. 58-59), and hearings were held before said Master,

during the course of which objections to said plan (R. 61) were filed by appellants on the ground that

> "said plan is not fair and equitable to the holders of the First Preferred Stock of the debtor in that it discriminates unfairly in favor of the holders of the Prior Preference stock of the debtor and against the holders of the First Preferred stock of the debtor."

On March 6, 1946, the Master filed his report (R. 66) overruling appellants' objections and approving the trustees' second amended plan as amended. Appellants' exceptions to the Master's report (R. 117) were overruled by the court which, by docket entry (R. 119), confirmed the report of the Special Master and approved the plan. On April 17, 1946, the court entered an order (R. 119) setting aside its informal order of approval, and on the same date entered an order (R. 120) referring the matter back to the Special Master. On April 19, 1946, the Special Master filed a further report (R. 123) adopting and incorporating substantially all of his previous report and making specific findings of fact (R. 124) and conclusions of law (R. 133). Appellants' exceptions to the Master's further report (R. 137) were overruled on June 29, 1946, by an order (R. 142) confirming the report (R. 123) of the Special Master and approving the Trustees' second alternative amended plan of reorganization as amended in compliance with conditions of orders of Securities and Exchange Commission (R. 259). This is the order appealed from in case number 11441 (R. 163).

THE TRUSTEES' PLAN

The plan approved involves essentially a revision of the debtor's capital structure consisting of bonds, prior preference stock, first preferred stock, second preferred stock, and common stock. It contemplates the satisfaction in full of the bondholders' claim for principal and interest and the claim of the prior preference stockholders for the par amount of their stock and dividends from January 1, 1933 to September 1, 1945. This leaves in the estate an amount insufficient to compensate the first preferred stockholders for the par amount of their stock; and the plan provides for the distribution to them of the remaining equity in the estate.

A comparison of the treatment proposed in the plan* for the Prior Preference and the First Preferred Stockholders, respectively, is shown in the following table:

Claims Allowed	Prior Preference Stock	First Preferred Stock
1. Par	5,682,400 (R. 221)	12,843,320 (R. 221)
2. Dividends to 4/3/39	2,386,398 (R. 29)	4,848,795 (R. 30)
3. Dividends 4/3/39 - 10/31/45	2,718,291	5,361,786
4. Total	10,787,089 (R. 221)	23,053,901 (R. 221)
5. Value of estate available after satisfaction of prior claims	12,906,875	2,119,786
6. Proportion of claims satisfied	100% (R. 243)	4.5% (R. 243)
7. Ratio of payment to par	193% (R. 243)	8.3% (R. 243)

APPELLANTS' CONTENTION

In terms of the foregoing table, appellants contend that $2,718,291 (line 3, supra) of the new securities

*The plan was amended after the sale of certain assets of the debtor and case number 11574 is an appeal from the order approving the amended plan. The same issue is posed by both appeals.

which the plan would give the Prior Preference Stockholders (representing dividends unpaid after the petition was filed) actually belong to the First Preferred Stockholders because

> "as a matter of law, the prior preference stockholders are not entitled, under any plan of reorganization, to compensation for dividends on their stock for any period subsequent to the institution of the within proceeding until after the first preferred stockholders have been compensated in full for their claim based upon the par or liquidating value of the first preferred stock. The plan approved by the order from which this appeal is taken conflicts with that principle of law and accordingly discriminates unfairly against the first preferred stockholders and in favor of the prior preference stockholders. It follows that the plan approved by the court below is not fair and equitable and the order appealed from approving said plan is erroneous." (R. 170)

SPECIFICATION OF ERROR

The Circuit Court erred in holding that the plan is fair and equitable.

SUMMARY OF ARGUMENT

The argument will be developed in two aspects:

1. The Debtor's Charter does not entitle the Prior Preference Stockholders to dividends pending reorganization.

> "The threshold question for the allowance of a claim is whether a claim exists. * * * If there was no valid claim before bankruptcy, there is no claim for

a bankruptcy court either to recognize or to reject."

Vanston Bondholders Protective Committee v. Green, supra.

2. The rules governing the administration of insolvent estates preclude compensating the Prior Preference Stockholders for dividends pending reorganization.

"Assuming, arguendo, that the obligation . . . is valid, . . . we would still have to decide whether allowance of the claim would be compatible with the policy of the Bankruptcy Act. Cf. Kuehner v. Irving Trust Co., 299 U.S. 445, 451, 81 L. Ed. 340, 345, 57 S. Ct. 298, 32 Am. Bankr. Rep., (N.S.) 487."

Vanston Bondholders Protective Committee v. Green, supra, at p. 178.

ARGUMENT

Point 1. The Debtor's Charter does not entitle the Prior Preference stockholders to dividends pending reorganization.

The rights of stockholders are defined in Article 7 of the Debtors' Charter. Section 1, which relates to the debtor as a going concern provides in part (R. 44-5):

"the holders of the prior preference stock are entitled to receive, when and as declared out of the surplus or the net profits of the company, dividends at the rate of seven (7%) percent per annum, payable as the Board of Directors may determine before any dividend shall be set apart for or paid upon the First Preferred Stock, the Second Preferred Stock, or the Common Stock, . . . The dividends upon the

> Prior Preference and the First Preferred stock shall be cumulative, but accumulations of dividends shall not bear interest. . . . The Board of Directors may pay dividends upon any class of stock provided dividends upon any and all prior classes, with all accumulations including accrued dividends to the date of payment of the dividends in question, shall have been paid in full or a sum sufficient for the payment thereof shall have been set apart for that purpose, but not otherwise . . ."

The relevant provisions of Section 2 of Article VII read as follows (R. 46-7):

> "In case of liquidation or dissolution of the company, the assets, whether consisting of capital assets or accumulated earnings, shall be distributed as follows: To the holders in the order named, first of the prior preference stock, second of the First Preferred stock in each case to the extent of $100.00 per share of each of said classes together with unpaid dividends accumulated and accrued thereon respectively . . . "

That this entitles the Prior Preference stockholders to dividends up to the institution of insolvency proceedings, but not thereafter is the precise holding of *Penington v. Commonwealth Hotel Const. Corp.*, (1931) 17 Del. Ch. 394; 155 Atl. 514; 75 A.L.R. 1136. That was a receivership proceeding of a corporation whose charter provided in part:

> "In the event of any liquidation, dissolution or winding up of the corporation, or upon any distribution of its capital, other than the redemption of its preferred stock, the holders of the preferred stock shall be entitled to be paid in full the par value thereof and all unpaid dividends accrued thereon,

before any amount shall be paid or any assets distributed to the holders of the common shares, and after the payment to the holders of the preferred stock of the amount payable to them as hereinbefore provided, the remaining assets and funds of the corporation shall be divided and paid to the holders of the common shares according to their respective shares."

The same court later had before it the corporate charter which provided in part:

"In the event of any liquidation or dissolution or winding up of the company, whether voluntarily or involuntarily, the holders of the preferred stock shall be paid in full the par value of their shares with all unpaid dividends thereon to the date of such payment before any amount shall be paid to the holders of the common stock,"

Garrett v. Edge Moor Iron Co., (1937) 22 Del. Ch. 142, 194 Atl. 15 Aff'd. sub nom *Pa. Co. v. Cox*, (1938) 23 Del. Ch. 193, 199 Atl. 671.

The court stated (p. 151):

"In the Commonwealth Hotel Construction case, the agreement of the stockholders set no date down to which the dividends should be calculated. Dividends, therefore, were calculable only to the date of the receivership.

"Here, however, the agreement is not silent upon the question. It provides that dividends shall be paid at the stipulated rate down *'to the date of such payment'*, that is to say down to the date when the per share par value is paid. This is the agreement and there is nothing illegal about it. The unpaid dividends should be paid accordingly."

In view of the point of distinction between these two Delaware cases, the omission of the words, "to the date of such payment" from the second section of Art. VII governing liquidation or dissolution of Pepco is decisive against the Prior Preferred Stockholders' claim for dividends pending reorganization. Moreover, the omission of those words from the liquidation section of the charter is given added emphasis in this case by contrast to their appearance in the *preceding* section of the very same article of the chater which provides in part:

> "The Board of Directors may pay dividends upon any class of stock provided dividends upon any and all prior classes, with all accumulations including accrued dividends *to the date of payment* of the dividends in question, shall have been paid in full or a sum sufficient for the payment thereof shall have been set apart for that purpose, but not otherwise * * * ." (emphasis supplied)
>
> 50 Am. Jur. 261, Statutes, Sec. 274.

The inclusion or omission of the words "to the date of payment' has been decisive in every case in which this question has arisen. The leading case is *People v. American Loan and Trust Co.,* 172 N.Y. 371, 65 N.E. 200, (1902) in which the debtor's charter and a state statute each gave priority, on liquidation of banks, to savings depositors as against commercial depositors. The court denied the priority as to interest for the period subsequent to the institution of the insolvency proceeding saying:

> "As the statute does not say that preferred claims shall be paid with interest *to the date of payment,* the courts should not, because the claims of substantially all the creditors, both preferred and unpreferred were alike in origin, for they were created by the deposit of money; and preferences in derogation of the common law should not be extended by construction beyond the express command of the statute." (emphasis supplied)

Some of the authorities are collected and discussed in *Greva v. Rainey,* 2 Cal. (2d) 338, 41 P. (2d) 328 (1935); *Hammer v. Tuffy,* 145 Fed. (2d) 447, 449 (C. C. A.) 2d (1944); cf. *Ledford v. Skinner,* 156 Or. 651, 69 P. (2d) 519 (1937).

The contract of the Prior Preference Stockholders does not provide that in liquidation they are entitled to dividends "to the date of payment." Hence, their claim for dividends must, as a matter of construction, be limited to the period prior to the institution of insolvency proceedings. This is the full extent of their priority and when this treatment has been accorded them, they will have received the complete compensation to which they are entitled. To allow them more than this, as the plan contemplates, would be unfair to the first preferred stockholders.

Point 2. The rules governing the administration of insolvent estates preclude compensating the Prior Preference stockholders for dividends pending reorganization.

Fairness requires that nothing of value may be allocated to any class of stockholders unless "the liquidation

preferences of the senior class are satisfied in full."

> *Otis & Co. v. S. E. C.*, 323 U.S. 624, 634; 65 Sup. Ct. 483; 89 L. Ed. 511; rehearing denied 324 U.S. 887, 65 Sup. Ct. 710, 89 L. Ed. 1436 (1945).

There can be no question that the Prior Preference Stock is senior to the First Preferred. However, as we have demonstrated in Point 1, supra, "the liquidation preferences" of the prior preference stock are satisfied in full by the payment of dividends accrued up to the filing of the petition in bankruptcy. No more is required by the absolute priority rule. No more is permissible in fairness to the first preferred stockholders.

> *Vanston Bondholders Committee v. Green*, supra.
> *Kuehner v. Irv. Tr. Co.*, 299 U.S. 445, 451; 57 Sup. Ct. 298, 81 L. Ed. 340 (1937).
> *Dayton v. Stanard*, 241 U.S. 588, 590; 36 Sup. Ct. 695, 60 L. Ed. 1190 (1916).

Once their express liquidation preference has been satisfied the prior preference stockholders have exhausted their senior position and they stand on a basis of complete equality with the first preferred stockholders. *Williams v. Renshaw*, 220 N.Y. Sup. 532. The fact of their seniority does not, by itself, entitle them to dividends for the period subsequent to the institution of this reorganization proceeding.

> "Where some of the claims are entitled to priority of payment, the general rule is that interest will not be computed and paid thereon unless the principal of all claims can be paid in full, or stated in

another way, that the preference does not include interest."

Hanson, Effect of Insolvency Proceedings on Creditor's Rights to Interest, 32 Mich. L.R., 1069 at 1071-1072. See cases collected in *Annotations* 69 A.L.R. 1210, 39 A.L.R. 457. *Glenn, Liquidation,* (1935) sec. 510.

The Circuit Court of Appeals for the Second Circuit commenting on *People v. American Loan & Trust Company,* 172 N.Y. 371, 65 N.E. 200, (1902), said in *Hammer v. Tuffy,* 145 Fed. (2d) 447, 449 (CCA 2d, 1944):

> "This seems to be the generally accepted doctrine when the question arises between two groups of creditors, one of which is entitled to priority by statute or otherwise. Whether or not the priority is stated to be until the group is 'paid in full,' the measure of the preference is the payment of the principal. We have collected a number of the cases in the margin."

Again, in *F. D. I. C. v. Department of Financial Institutions,* 113 Ind. Ap. 14, 44 N.E. (2d) 992 (1942), the Court said:

> "* * * 'paid in full' or 'payment in full' at least between prior and junior creditors in a liquidation proceeding generally are held to refer to the payment in full of the principal of the claims as they existed as of the date of the commencement of the receivership or liquidation, as the case may be, not including interest after the date of the commencement of the liquidation." (p. 27)
>
> "As between different class of creditors, no interest accruing subsequent to insolvency will be paid to creditors of any one class until creditors of

all classes have been paid the principal amounts of their claims in full." (p. 24)

This doctrine has been followed uniformly, not only in bankruptcy, but in all types of insolvency proceedinps. The cases are legion. The court is referred especially to *Reichert v. Metropolitan Trust Co.,* (1940) 293 Mich. 76, 291 N.W. 228; *In re Farmers Bank of Lone Rocks,* (1946) 248 Wis. 269, 21 N.W. (2d) 410; *Greva v. Rainey,* 2 Cal. (2d) 338, 41 P. (2d) 328 (1935); *Stein v. Delano,* 121 Fed. (2d) 975 (CCA 3, 1941); *Thomas v. Western Car. Co.,* 149 U.S. 95, 116; 13 S. Ct. 824, 37 L. Ed. 663; *Taylor v. Corning Bk. & T. Co.,* 185 Ark. 691, 48 S.W. (2d) 1102 (1932); *Squire v. Am. Exp. Co.,* 131 Ohio St. 239, 2 N.E. (2d) 766 (1936); *In re Prudential Tr. Co.,* 244 Mass. 64, 138 N.E. 702 (1923); *People v. Merchants T. Co.,* 187 N.Y. 293, 79 N.E. 100 (1907); *Home L. Ins. Co. v. Wosson,* 187 Ark. 769, 62 S.W. (2d) 27 (1933); *In re Pacific Coast Building Loan Association,* (1940) 15 Cal. (2d) 134, 99 P. (2d) 251.

Appellants' position is very simple:

1. Except for Article VII, Sec. 2 of Debtor's Charter, which gives them a certain priority in liquidation, the Prior Preference tockholders would stand on a par with the First Preferred stockholders in this proceeding.

2. It is the filing of the Chapter X petition which alone brings into operation the liquidation priority of the Prior Preference stockholders. *Otis & Co. v. S. E. C.,* supra.

3. The theme of the Bankruptcy Act and every other judicial device for liquidation or reorganization is equality of distribution as of the date the estate comes into *custodia legis*.

4. The priority of the Prior Preference stockholders therefore is limited to what was due them on that date.

In reorganization procedings the court deals with the interest of creditors and others as they existed at the time the proceeding was instituted. *Price v. Spokane Silver & Leading Co.*, 97 Fed. (2d) 237, 245. The theme of the Bankruptcy Act, and every other judicial device for liquidation or reorganization, is equality of distribution as of the date the estate comes into *custodia legis*. *Harkin v. Brundage*, 276 U.S. 36, 42-3, 45, 48 S. Ct. 268. *In re Assoc. Gas & Elec. Co.*, 149 F. (2d) at 1006; *Moore v. Bay*, 45 F. (2d) 449.

That principle prevails whether the Trustee is an operator or merely a custodian. *Group of Inst. Inv. v. C. M. St. P. & P. R. Co.*, 318 U.S. 523, 573, 87 Law Ed. 959, 1011; *In re Assoc. Gas & Elec. Co.*, 149 F. (2d) 996. The cases construing the charter provisions merely give effect to this well established principle. *Greva v. Rainey*, 2 Col. (2d) 338; 41 P. (2d) 328. *In re Pac. Coast Bldg. Loan Assn.*, 15 Cal. (2d) 134, 99 Pac. (2d) 251.

In the absence of controlling precedent, the instant case must be decided on principle and analogy. Two competing principles are presented between which this court must choose:

1. As between creditors of different classes, none is entitled to interest out of general assets, regardless of their relative priorities until all have received principal. *Sexton v. Dreyfus,* 219 U.S. 339, 31 S. Ct. 256; *Ticonic Natl. Bank v. Sprague,* 303 U.S. 406, 82 Law Ed. 926; *Group of Institutional Investors v. C. M. St. P. & P. R. Co.,* 318 U.S. 523, 573, 87 Law Ed. 959, 1011; *Glenn Liquidation,* (1935) Sec. 510; *Hanson, Effect of Insolvency Proceedings on Creditors' Right to Interest,* 32 Mich. Law Review 1069 at 1071, 1072. Appellants contend (p. 16-19) that this is the controlling analogy, and that as between *stockholders* of different classes, just as between *creditors* of different classes, none is entitled to dividends pending reorganization, regardless of their relative priorities, until all have received par.

2. As between creditors and stockholders, the former are entitled to payment in full with interest to the date of payment before the latter participate at all. Respondents press this analogy, contending (S.E.C. 19) that:

> "By virtue of their charter preferences, the prior preference stockholders in the instant case, are in the same position with respect to the first preferred stockholders as are creditors with respect to stockholders generally."

The antithesis of these two propositions is the crux of the issue between appellants and respondents on this appeal. Respondents can prevail only if the relationship between the two contending groups of stockholders in the instant case can be assimilated to the relationship between creditors and stockholders.

The allowance of interest to bondholders as against stockholders rest on what has been called the "judgment theory". *In re Realty Associates Sec. Corp.*, 66 Fed. Supp. 416. In that case the court said (p. 420):

> "Bondholders should in no way be prejudiced by the debtor's institution of a Chapter X proceeding and that they could therefore not now be denied the right to interest at 6% to which they would have become entitled had they not been stayed from procuring judgments, at least for the unpaid principal upon maturity of the bonds."

This analysis demonstrates conclusively the fallacy of analogizing the Prior Preference stockholders' position to that of a creditor. The corporation owes an obligation to its creditors on which it defaults when it files a petition under Chapter X. *Central Tr. Co. v. Chi. Auditorium Assn.*, 240 U.S. 581, 36 S. Ct. 412. That default entitles the creditor to a judgment against the corporation. The institution of the Chapter X proceeding prevents the creditors from reducing his claim to judgment, and the courts hold that the suspension of his remedy cannot be allowed to impair his rights. cf. *Louisville Joint Stock Land Bank v. Radford*, supra.

By contrast, the corporation owes no similar obligation to its stockholders. Dividends are payable to stockholders, not absolutely, as interest is payable to creditors, but only "when and as declared out of the surplus or net profits of the company." (R. 44). cf. *In re Fechheimer-Fishel Co.*, 212 Fed. 357. *Hazel Atlas Glass Co. v. Van Dyk & Reeves*, 8 Fed. (2d) 716. Stockholders

have no right against the corporation, either for the par amount of their stock or for dividends thereon, which is capable of being reduced to judgment. Hence the institution of the Chapter X proceeding affects no remedy available to stockholders. They suffer no prejudice whatsoever by virtue of the institution of the Chapter X proceeding. On the contrary, they are the ones who benefit. Their position is altogether different than that of creditors, and there is no justification whatever for treating the Prior Preference stockholders as though they were creditors.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Morris L. Foren,
Packard Bldg.,
Philadelphia, Pa.
Attorney for Appellants.